(4)

Supreme Court, U.S.
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NO. 04-881

IN THE

Supreme Court of the United States

JAMES LOCKHART,
Petitioner,

v.

UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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July 2005

QUESTION PRESENTED

Does the anti-attachment provision of the Social Security Act, 42 U.S.C. § 407, combined with the provision of the Debt Collection Act that prohibits the government from using its offset authority to recover debts that have been outstanding for more than 10 years, 31 U.S.C. § 3716(e)(1), prevent the United States from offsetting social security benefits to collect a student loan debt that has been outstanding for more than 10 years?

LIST OF PARTIES

Petitioner:
James Lockhart

Respondents:
United States of America
Secretary of Education of the United States
Secretary of the Treasury of the United States
Attorney General of the United States

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 376 F.3d 1027 and is reproduced in the appendix to the petition for a writ of certiorari (Pet. App.) at 1a. The court of appeals' unreported order denying petitioner's petition for rehearing is reproduced at Pet. App. 9a. The district court's unreported order dismissing the complaint is reproduced at Pet. App. 8a.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2004. A timely petition for rehearing was denied on November 4, 2004. The petition for a writ of certiorari was filed on December 29, 2004, and granted on April 25, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The anti-attachment provision of the Social Security Act of 1935, as amended, 42 U.S.C. § 407, provides:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

In 1991, Congress enacted the following amendment to the Higher Education Act of 1965, 20 U.S.C. § 1091a(a):

> (2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by–
>
> . . . .
>
> (D) the Secretary [of Education], the Attorney General, the administrative head of another Federal agency . . . for the repayment of [a student loan] . . . that has been assigned to the Secretary . . . .

In 1996, Congress enacted the Debt Collection Improvement Act (DCIA), as an amendment to the Debt Collection Act of 1982. The DCIA made social security benefits subject to offset as a means for collecting debts owed to the government. However, the DCIA also recodified a provision that prohibits the government from using its offset authority to recover debts that have been outstanding for more than 10 years. The statute, codified at 31 U.S.C. § 3716, provides in relevant part as follows:

> (c)(3)(A)(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)) . . . except as provided in clause (ii), all payments due to an individual under . . . the Social Security Act . . . shall be subject to offset under this section.
>
> (ii) An amount of $9,000 which a debtor may receive under Federal benefit programs cited under

> clause (i) within a 12-month period shall be exempt from offset under this subsection.
>
> . . . .
>
> (e) This section does not apply–
>
> (1) to a claim under this subchapter that has been outstanding for more than 10 years; or
>
> (2) when a statute explicitly prohibits using administrative offset to collect the claim or type of claim involved.

STATEMENT OF THE CASE

In the 1980's, petitioner James Lockhart took out federally guaranteed student loans issued by various lenders to finance his higher education. After Mr. Lockhart was unable to repay most of them because of health problems and resulting dire economic circumstances, the loans were assigned to the Department of Education as provided by law. *See generally* 34 C.F.R. § 682.409. At the time Mr. Lockhart filed this suit, his only income consisted of social security disability benefits, which were thereafter converted to retirement benefits when Mr. Lockhart turned 65 in 2003. However, since 2002, those benefits have been reduced by the government to collect Mr. Lockhart's past-due student loans.

The parties agree that, since 1991, no statute of limitations applies to most efforts by the government to collect delinquent student loans. They also agree that, since 1996, the government has been authorized to collect outstanding student loan debt through the administrative offset of social security benefits. But the parties do *not* agree that an administrative offset of social security benefits to collect student loan debt can be effected at any time, as the government maintains. Rather, as we show below, Congress has prohibited such administrative offsets to collect debt that has been outstanding for more than

10 years, and, therefore, the offset of Mr. Lockhart's social security benefits to collect older debt is unlawful. *See* 31 U.S.C. § 3716(e)(1). That conclusion is underscored by the Social Security Act's anti-attachment provision, 42 U.S.C. § 407, which prohibits seizure of social security benefits except in narrow circumstances not present here.

A. Statutory Framework

Answering the question presented requires the synthesis of four provisions enacted at four different points in time and contained in three distinct statutory schemes: the Social Security Act, the Higher Education Act, and the Debt Collection Act (as amended by the Debt Collection Improvement Act). The chronology of these enactments is crucial to understanding why the government lacks authority under the Debt Collection Act to offset Mr. Lockhart's social security benefits to collect student loan debt that has been outstanding for more than 10 years and how the Ninth Circuit erred in holding to the contrary.

1. The Social Security Act of 1935

The Social Security Act of 1935, as amended, establishes various social insurance programs for wage earners and their dependents, 42 U.S.C. § 401, *et seq.* These programs were designed principally to provide Americans minimum levels of income to buffer the economic insecurity that often accompanies old age. *See* H.R. Rep. No. 74-615, at 1-10 (1935); S. Rep. No. 74-628, at 2-10 (1935); *see also In re Buren*, 725 F.2d 1080, 1084 (6th Cir. 1984).

The benefits paid by these programs have always been protected by a very strict anti-attachment provision. The provision states that "none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. §

407(a). As this Court has recognized, "[t]he language is all-inclusive." *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 415 (1973). "[I]t imposes a broad bar against the use of any legal process to reach all social security benefits." *Id.* at 417; *accord Bennett v. Arkansas*, 485 U.S. 395 (1988).

In 1983, Congress strengthened the already broad protection afforded by the anti-attachment provision in response to bankruptcy court decisions permitting the attachment of social security benefits by bankruptcy trustees based on the supposed repeal by implication of section 407 by the Bankruptcy Reform Act. *See, e.g.*, S. Rep. No. 98-23, at 82-83 (1983), *reprinted in* 1983 U.S.C.C.A.N. 301-02; *see also United States v. Duvall*, 704 F.2d 1513 (11th Cir. 1983). Congress added an unusual prohibition: "No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." Pub. L. No. 98-21, § 335(a), 97 Stat. 130 (1983) (codified at 42 U.S.C. § 407(b)).

2. The Debt Collection Act of 1982

Several statutes authorize federal agencies, including the Department of Education, to employ a number of means to collect debts owed to the United States. In addition to filing suit to obtain or collect a judgment, the Secretary of Education may collect student loan debts through other legal processes. For example, federal law allows agencies to collect a debt by directing the Department of the Treasury to intercept tax refunds, 31 U.S.C. § 3720A, or, where a debt is owed by a federal employee, by deducting part of the employee's salary. 5 U.S.C. § 5514. The Department of Education also has authority to garnish the wages of private employees by issuing administrative garnishment orders. 20 U.S.C. § 1095a.

This case concerns a particular debt collection tool

available to federal agencies. The Debt Collection Act of 1982 (DCA) authorizes the federal government to collect debts by means of "administrative offset," 31 U.S.C. § 3716(a), which the Act defines as "withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim." *Id.* § 3701(a)(1). The Treasury Department operates a centralized program, known as the Treasury Offset Program, that is used by federal agencies to collect debt by offsetting various payments, including tax refunds and federal salaries. Under this program, creditor agencies, such as the Department of Education, certify to the Secretary of the Treasury nontax debts that are over 180 days delinquent to be collected by administrative offset. 31 U.S.C. § 3716(c)(6). After providing notice allowing the alleged debtor to challenge the offset or to seek to settle the government's proposed offset, *id.* §§ 3716(a), (c)(7), the officials disbursing payments on behalf of federal agencies withhold funds to pay the claim.

The DCA, however, specifically exempts two categories of claims from administrative offset. First, the government's offset authority "does not apply . . . to a claim under this subchapter that has been outstanding for more than 10 years." 31 U.S.C. § 3716(e)(1) (previously codified at 31 U.S.C. § 3716(c)(1)).[1] Second, the government lacks offset authority

[1]In the original DCA, enacted in 1982, the 10-year bar was stated somewhat differently. *See* Pub. L. 97-365, § 10(2), 96 Stat. 1754 (1982) (codified at 31 App. § 954(a)) ("[N]o claim under this Act that has been outstanding for more than ten years may be collected by means of administrative offset."). Shortly thereafter, the provision was re-worded to read as it does in the text and was recodified at 31 U.S.C. § 3716(c)(1), as part of a revision of Title 31 of the United States Code. *See* Pub. L. 97-452, § 1(16)(A), 96 Stat. 2472 (1993).

"when a statute explicitly prohibits using administrative offset or setoff to collect the claim or type of claim involved." *Id.* § 3716(e)(2) (previously codified at 31 U.S.C. § 3716(c)(2)).[2]

By virtue of the Social Security Act's anti-attachment provision, the government's administrative offset authority did not extend to social security benefits at the time of the DCA's enactment in 1982, as acknowledged in the Department of Education's implementing regulations. *See* 51 Fed. Reg. 24,095, 24,099 (July 1, 1986) (originally codified at 34 C.F.R. § 30.20(c)(2); now codified at 34 C.F.R. § 30.20(b)(2)). As explained below, social security benefits did not become subject to offset until 1996, when the DCA was amended.

3. Higher Education Technical Amendments of 1991

In 1991, Congress amended the Higher Education Act of 1965 to provide that obligations to repay federal student loans and grant overpayments would, in most instances, be enforceable without regard to limitations periods. The amendment stated: "Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by" the Secretary of Education or another government agency "for the repayment of [a student loan] . . . that has been assigned to the Secretary." Higher Education Technical Amendments of 1991 (HETA), Pub. L. No. 102-26, § 3, 105 Stat. 123, 124 (1991) (codified at 20

[2]As initially enacted, this provision prohibited offset "when a statute explicitly *provides for or* prohibits using administrative offset to collect the claim or type of claim involved." *See* Pub. L. 97-452, § 1(16)(A), 96 Stat. 2472 (1983) (codified at 31 U.S.C. § 3716(c)(2)) (emphasis added). *See infra* at 21-22 (discussing this change).

U.S.C. § 1091a(a)(2)).

HETA's legislative history indicates that Congress was concerned primarily with the government's collection of student loan debt through the offset of *tax refunds*, as authorized by 31 U.S.C. § 3720A. The amendment was a direct response to *Grider v. Cavazos*, 911 F.2d 1158, 1164-65 (5th Cir. 1990), which held that student loan debt could not be collected by tax refund offset if the debt had been delinquent for more than 10 years.[3] *See* 137 Cong. Rec. H1808, H1810 (daily ed. Mar. 19, 1991) (statement of Rep. Ford) (noting that amendment "overcomes a recent circuit court decision that puts in jeopardy the ability of the Department of Education to collect defaulted student loans through offsets of income tax refunds and other means. In particular, the bill would eliminate the statute of limitations with respect to recovery of defaulted student loans through offsets of Federal income tax refunds, litigation, and garnishment, where otherwise permitted by Federal law."); *id.* at H1812 (statement of Rep. Barrett) ("[W]e are restoring the highly successful tax offset mechanism to collect on defaulted student loans.").

The HETA amendment neither mentioned social security benefits nor made express reference to the Social Security Act's anti-attachment provision, 42 U.S.C. § 407. That is not surprising, because, at the time the amendment was enacted, the government did not have the authority to offset social security benefits under any circumstances. As explained immediately below, that authority did not exist until 1996.

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[3]Section 3720A does not itself contain a limitations period, but it requires the Treasury Department to issue regulations prescribing, among other things, "the time or times at which agencies must submit notices of past-due legally enforceable debts." 31 U.S.C. § 3720A(d). The Treasury Department, in turn, issued a regulation establishing a 10-year bar. *See Grider*, 911 F.2d at 1161.

4. The Debt Collection Improvement Act of 1996

In 1996, Congress enacted the Debt Collection Improvement Act (DCIA), a comprehensive amendment to the Debt Collection Act that expanded the debt collection tools available to the government. *See* Pub. L. No. 104-134, § 31001, 110 Stat. 1321-358 (1996). The DCIA authorized the withholding of social security payments through administrative offset for the first time, making the express reference to the Social Security Act's anti-attachment provision required by 42 U.S.C. § 407(b). *See* 31 U.S.C. § 3716(c)(3)(A)(i); *supra* at 2 (quoting provision).

However, the DCIA also imposed a number of important safeguards and limitations. For example, the first $9,000 of social security or other payments are exempt from offset. *Id.* § 3716(c)(3)(A)(ii); *see also* 31 C.F.R. § 285.4(e)(1). Furthermore, in seeking to "ensure that debtors have all appropriate due process rights, including the ability to verify, challenge, and compromise claims," Pub. L. No. 104-134, § 31001(b)(5), 110 Stat. 1321-359 (1996), the DCIA required that agencies adopt uniform regulations on collection by administrative offset, 31 U.S.C. § 3716(b), and that the official conducting the administrative offset provide the payee with notice of the offset and information to enable the payee to contact the agency with concerns regarding the offset. *Id.* § 3716(c)(7). The DCIA also recodified a part of the Debt Collection Act providing that administrative offsets may only be imposed after the debtor has been given notice of the agency's claim, an opportunity to contest the debt in administrative review, and an opportunity to negotiate an agreement for repayment. *Id.* § 3716(a).

Most importantly for this case, the DCIA recodified the DCA's provision stating that the government's offset authority

"does not apply" "to a claim . . . that has been outstanding for more than 10 years," which previously had been codified at 31 U.S.C. § 3716(c). *See* 31 U.S.C. § 3716(e)(1).

The DCIA's legislative history shows that Congress was particularly concerned about the impact that administrative offset might have on social security beneficiaries and intended the government to strictly observe safeguards and limitations on its offset authority. "Such safeguards are critical," the Conference Report emphasized, "when benefits such as Social Security are the sole or major source of income for the debtor." H.R. Conf. Rep. No. 104-537, 142 Cong. Rec. H4187, H4286-87 (daily ed. Apr. 30, 1996).

5. The Failed 2004 Effort to Amend the DCA to Authorize Offset of Debts Outstanding for More Than 10 Years and to Provide an Express Reference to Section 407

One other piece of legislation bears mention. Late last year, there was a failed effort to amend the DCA to authorize government offset regardless of how long the underlying debt has been outstanding. Moreover, this legislation would have made an express reference to the anti-attachment provision, 42 U.S.C. § 407, to authorize the offset of social security benefits to collect debts that have been outstanding for more than 10 years. The amendment, which was introduced in identical form in both the House of Representatives and the Senate, provided as follows:

> Subsection (e) of section 3716 of title 31, United States Code, is amended to read as follows:
> "(e)(1) Notwithstanding any other provision of law (including 42 U.S.C. 407 and 1383(d)(1), 30 U.S.C. 923(b), and 45 U.S.C. 231(m), regulation, or administrative limitation, no limitation shall terminate the period within which an offset may be initiated or taken pursuant to this section.
> "(2) This section does not apply when a statute explicitly prohibits using administrative offset or setoff to collect the claim or type of claim involved."

H.R. 5025, § 642, 108th Cong. (introduced Sept. 8, 2004); *see also* S. 2806, § 642,108th Cong. (introduced Sept. 15, 2004). These provisions were adopted verbatim from the President's proposed fiscal year 2005 budget. *See* Fiscal Year 2005 Budget of the United States Government, Appendix (Government-Wide General Provisions), at 13 (§ 636) (available at www.whitehouse.gov/omb/budget/fy2005/pdf/appendix/ggp.pdf) (last visited July 5, 2005). The provision was struck in the conference committee negotiating the omnibus appropriations bill for fiscal year 2005, and thus was not included in the Consolidated Appropriations Act that was signed by the President on December 8, 2004. *See* Pub. L. No. 108-447, 118 Stat. 2809 (2004).

B. Factual Background

At the time he brought this lawsuit, petitioner James Lockhart survived on a fixed income consisting of $874 in monthly Social Security Disability (SSD) benefits and $10 in monthly food stamps. SER 17 at 23-24.[4] Following his sixty-fifth birthday in July 2003, Mr. Lockhart's period of disability ended, and he began receiving old-age benefits. *See* 20 C.F.R. § 404.321(c)(1).

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[4]Citations to "SER" refer to the Supplemental Excerpts of Record filed by Mr. Lockhart in the court of appeals. For each reference, the first number is the document number and the second number is the page number.

In addition to ordinary living expenses, Mr. Lockhart must use his monthly benefits to pay for significant medical expenses. He underwent double bypass heart surgery in 1999 and requires six prescription medications for his lingering cardiovascular problems. SER 3 at 28. He also suffers from Type 2 diabetes, which requires him to purchase additional medical supplies. *Id.* Not surprisingly, he struggles to meet these expenses with his limited social security benefits. *Id.* 2 at 12.

Mr. Lockhart became unemployed in 1981, and his only subsequent employment lasted for a few months in 1987. *Id.* 2 at 6-7. He attended several institutions of higher education between 1984 and 1990, borrowing a series of federally guaranteed educational loans. *Id.* 2 at 7. He was unable to repay the majority of these loans, and the earliest debt was assigned to the Department of Education in October 1991. *Id.* 1 at 44.

On February 6, 2002, Mr. Lockhart was notified that his social security benefits would be withheld to offset his student loan debt. *Id.* 2 at 9. Mr. Lockhart contacted the Department of Education the following day to request an administrative review of the decision to offset his payments. *Id.* On April 4, 2002, he received official notification from the Department of the Treasury that his benefits would be offset up to 15% each month to pay the delinquent student loan debts. *Id.* 18 at 31. The government began offsetting his benefits in May 2002 and is continuing to do so.

C. Proceedings Below

1. District Court

Mr. Lockhart filed this action *pro se* in the District Court for the Western District of Washington on March 20, 2002, seeking an injunction prohibiting the government from offsetting his social security benefits. Mr. Lockhart's complaint

alleged that the United States's "attempt to garnish [his] SSD payments by administrative offset is time barred under 31 U.S.C. Sec. 3716(e)(1), as amended, because more than 10 years have passed since [his] education loans became outstanding." SER 2 at 14; *see also id.* 3 at 18 ("The Department of Education (ED) commenced its offset action . . . well over ten years after the time Lockhart's loans became outstanding.").[5] On May 16, 2002, the district court, acting *sua sponte*, ordered Mr. Lockhart to show cause why his complaint should not be dismissed for failure to state a claim and for lack of subject matter jurisdiction. Mr. Lockhart responded to the order and attempted to clarify his allegations, but the district court summarily dismissed the complaint. Pet. App. 8a.

2. Court of Appeals

The Ninth Circuit affirmed. Pet. App. 1a-7a.[6] The panel based its decision on a sweeping interpretation of the government's authority to offset social security benefits under the DCIA, 31 U.S.C. § 3716(c)(3)(A)(i). The court opined that the DCIA "explicitly removes any protection under section 407 that Social Security benefits may have had from offset, and thus allows the government to reach Lockhart's benefit[s] in order to collect on his debt." *Id.* 6a. The court recognized, however, that the 1996 Act had recodified the express bar on the

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[5] In its brief in response to the petition for a writ of certiorari, the government acknowledged that at least some of Mr. Lockhart's debt had been outstanding for more than 10 years before the Treasury Department sought to offset Mr. Lockhart's social security benefits. *See* Br. for the United States 15 (filed Feb. 25, 2005).

[6] Mr. Lockhart filed his appeal *pro se* and completed a full round of briefing without the benefit of counsel. A second round of briefing was completed after the University of Arizona College of Law's Pro Bono Appellate Project agreed to represent Mr. Lockhart in the court of appeals.

government's authority to collect by offset debt that has been outstanding for more than 10 years. Thus, the court observed, "[a] puzzle has been created by the codifiers." *Id.*

The Ninth Circuit's solution to this "puzzle" relied on a theory of implied repeal. "[I]t seems clear," the court explained, "that in 1996, Congress explicitly authorized the offset of Social Security benefits, and that in the Higher Education Act of 1991, Congress had overridden the 10-year statute of limitations as applied to student loans. That the codifiers [of the 1996 Act] failed to note the impact of the 1991 repeal on section 3716(e) does not abrogate the repeal." *Id.* Accordingly, the court concluded, all of Mr. Lockhart's debts could be collected by offset regardless of how long they had been outstanding. *Id.* 7a. The Ninth Circuit did not explain how its reasoning could be reconciled with the Social Security Act's anti-attachment provision or the express reference provision of 42 U.S.C. §407(b).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision should be reversed because it cannot be squared with the chronology of the relevant enactments, the Social Security Act's express reference provision, and the text of the DCIA.

The government's reliance on HETA's abrogation of limitation periods for collection of student loan debt, 20 U.S.C. § 1091a(a)(2), falters in light of the order of the relevant enactments. When HETA was enacted in 1991, Congress could not have intended that it would apply to the offset of social security benefits because, at that time, Congress had not yet made the express reference to the Social Security Act's anti-attachment provision, *see* 42 U.S.C. § 407, that was necessary to provide the government with the authority to offset social security benefits.

In 1996, Congress made an express reference to 42

U.S.C. § 407, authorizing offset of social security benefits, *see* 31 U.S.C. § 3716(c)(3)(A)(i), but it did so in an act (the DCIA) that recodified a part of the Debt Collection Act prohibiting the government from using administrative offset to collect a debt that has been outstanding for more than 10 years. *See* 31 U.S.C. § 3716(e)(1). Put otherwise, that provision did no more than authorize offsets of social security benefits to collect debts that have been outstanding for 10 years or less. Neither the DCIA nor any statute specifically referencing section 407 authorizes collection by offset of student loan debt that has been outstanding for more than 10 years. The Ninth Circuit's decision should therefore be reversed because it allows HETA to "limit, supercede, or otherwise modify" section 407's strict anti-attachment provision *without* the required express reference to that section, in violation of 42 U.S.C. § 407(b).

The text and history of the DCIA also require reversal. The express reference to section 407 authorizing offset of social security benefits was not enacted as a stand-alone provision, but as part of the DCIA. The DCIA comprehensively reviewed and overhauled the Debt Collection Act, but retained the 10-year bar on offset authority, indicating that Congress meant the 10-year bar to apply to *all* offsets, including offsets of social security benefits to recover student loan debts, just as it had when it enacted the Debt Collection Act in 1982. That understanding of the DCIA is also required by the canon of statutory construction that amendments should be read to include the provisions of the original act into which they are inserted. 1A *Sutherland Statutory Construction* § 22.34 (6th ed. 2002). For these reasons, the government's authority to offset Mr. Lockhart's social security benefits "does not apply" when the government is seeking to recover a student loan debt that has been outstanding for more than 10 years. *See* 31 U.S.C. § 3716(e)(1).

ARGUMENT

THE CHRONOLOGY OF THE RELEVANT ENACTMENTS, THE SOCIAL SECURITY ACT'S ANTI-ATTACHMENT AND EXPRESS REFERENCE PROVISIONS, AND THE TEXT OF BOTH HETA AND THE DCIA REQUIRE REVERSAL.

A. HETA's Abrogation of Statutes of Limitations in 1991 Does Not Apply to the Offset at Issue Here Because the Authority to Offset Social Security Benefits Did Not Exist at That Time and the Later-Enacted DCIA Contains a 10-Year Bar on Offset Authority.

1. Based solely on the legislative chronology discussed above (at 4-11), the Court should reject the government's position in this case. That position depends on the passage in 1991 of HETA, which overrode existing limitations periods regarding collection of student loans. However, in 1991, the government had no authority to offset social security benefits (which did not exist until 1996, with the enactment of the Debt Collection Improvement Act). Therefore, Congress could not, in 1991, have intended to eliminate a time bar that would have applied to the offset of social security benefits. As the Eighth Circuit has put it: "[W]hen 'Congress removed all statute of limitations obstacles in § 1091a, it could not have contemplated that its actions would have any effect on Social Security payments, because such payments were not yet subject to offset[.]'" *Lee v. Paige*, 376 F.3d 1179, 1180 (8th Cir. 2004) (quoting *Lee v. Paige*, 276 F. Supp. 2d 980, 984 (W.D. Mo. 2003)), *pet. for cert. pending sub. nom.*, *Spellings v. Lee*, No. 04-1139 (U.S. filed Feb. 25, 2004); *accord Guillermety v. Sec'y of Educ.*, 241 F. Supp.2d 727, 753 (E.D. Mich.2002).

The Ninth Circuit's contrary ruling – which adopts the government's view (*see* Pet. App. 17a) – misses the mark. The court of appeals opined that the fact that "the codifiers [of the DCIA] failed to note the impact of the 1991 repeal on [the DICA's 10-year bar] does not abrogate the repeal." Pet. App. 6a. But that simply begs the question: What was it that Congress was repealing in 1991? It makes sense to say that Congress was repealing *existing* statutes of limitations applicable to *then-valid* means of debt collection. But it makes no sense to ascribe to Congress the repeal of a time bar regarding the offset of social security benefits because, at that time, there was no such thing to repeal.

2. Indeed, the government's view that it can collect student loan debt at any time by offsetting social security benefits runs headlong into the Social Security Act's anti-attachment provision, 42 U.S.C. § 407(a), and its express reference requirement. *Id.* § 407(b). The parties agree that both when 42 U.S.C. § 407(a) was enacted in 1935, and when the express reference provision was added in 1983, the anti-attachment provision barred offsets of social security benefits to collect student loans. *See* 51 Fed. Reg. 24,095, 24,099 (July 1, 1986) (originally codified at 34 C.F.R. § 30.20(c)(2); now codified at 34 C.F.R. § 30.20(b)(2)) (Secretary of Education does not have offset authority under Debt Collection Act if "the payment against which offset would be taken . . . arises under the Social Security Act"); Br. for Appellants Secretary of Education, *et al.*, at 8, in *Guillermety v. Sec'y of Educ.*, No. 03-1604 (6th Cir. filed Sept. 25, 2003) (Debt Collection Act of 1982 "did not authorize offsets of social security benefits, because it did not contain the explicit reference to 42 U.S.C. 407 that 42 U.S.C. 407(b) requires."). The parties also agree that HETA's 1991 provision abrogating existing limitations

periods with respect to student loan debt did not alter the bar on social security offsets because it did not address offset authority, let alone contain the express reference to section 407 that would subject social security benefits to offset.

The government maintains that these facts are irrelevant because of the subsequent enactment of the DCIA in 1996, specifically 31 U.S.C. § 3716(c)(3)(A)(i), which subjected social security benefits to offset and expressly referred to section 407. But that argument misapprehends the 1996 enactment. As explained in greater detail below (at 20-23), the 10-year bar on offset authority is a part of the DCIA. And neither the DCIA nor any statute specifically referencing section 407 authorizes collection by offset of student loan debt, or any other debt, that has been outstanding for more than 10 years.

Thus, the only way for the government to reach the result it desires is to use HETA, 20 U.S.C. § 1091a(a)(2), to create offset authorization beyond 10 years, even though that enactment does not expressly reference 407. In other words, the government is demanding that a "provision of law" – HETA – "be construed to limit, supersede, or otherwise modify the provisions of" 42 U.S.C. § 407, *without* Congress having made an "express reference to th[at] section." *See id.* § 407(b). The government's position must be rejected because it seeks to enlarge the scope of the government's offset authority via section 1091a(a)'s purported implied repeal of the bar on offsetting social security benefits to collect debt that has been outstanding for more than 10 years – which is precisely what section 407(b) forbids. *See Philpott*, 409 U.S. at 416 (rejecting, as contrary to statutory text, "an implied exemption from § 407"); *Bennett*, 485 U.S. at 397-98 (same); *In re Buren*, 725 F.2d at 1085-87.

3. Mr. Lockhart need not rely on the chronology of the enactments alone. The section of HETA that eliminated

limitations periods "notwithstanding any other provision of statute, regulation, or administrative limitation," 20 U.S.C. § 1091a(a)(2), is most naturally read as applying only to *existing* limitations. In the first place, it does not expressly refer to future enactments. Moreover, the legislative history buttresses that conclusion because the motivating factor for the enactment of section 1091a(a)(2) was a circuit court decision that restricted the time period for offsetting tax refunds to collect student loan debt – offset authority that already existed under 31 U.S.C. § 3720A. *See supra* at 8 (legislative history describing impetus for section 1091a(a)(2)). Congress's specific focus on offset authority under pre-existing legislation is reason to reject the notion that Congress meant to reach not-yet-contemplated legislation.

Aside from the specific circumstances presented by the 1991 HETA provision at issue here, it should not be presumed that Congress would, ordinarily, want its current enactments to operate on future legislation in the manner demanded by the government's interpretation of section 1091a(a)(2). Such expansive interpretations would run the risk of conflict with other legislative objectives (as in this case, with the policy of protecting social security benefits from creditors), because an earlier Congress cannot know what a later one would desire. It thus makes sense to force Congress to speak clearly; Congress can, if it chooses, draft legislation to demonstrate its intent to affect future legislation. A prime example is the Social Security Act's anti-attachment statute, 42 U.S.C. § 407, discussed above. Subsection (a) of section 407 broadly bars the assignment or transfer of "any future payment" of social security benefits and bars creditors from reaching such benefits. Of particular relevance, in subsection (b) of section 407, Congress established the sole circumstances under which subsection (a) may be overridden, *at any time*, when it said that "[n]o other provision of law, enacted before, on, or *after* April 20, 1983"

could limit the anti-attachment provision without expressly referring to section 407. 42 U.S.C. § 407(b) (emphasis added). *See also* 28 U.S.C. § 1658(a) (unless otherwise provided by law, four-year statute of limitations applies for causes of action created by future acts of Congress). In enacting 20 U.S.C. § 1091a(a)(2), however, Congress did not refer to future enactments in this way.

In this regard, it is important to recall that, at the end of the 108th Congress, the Bush Administration proposed to expressly eliminate any time bar on administrative offset in an amendment to the DCA that contained an express reference to section 407. That provision was included in both the House and Senate versions of the Transportation, Treasury and General Government Appropriations Act, but was stricken from the Conference Report shortly before the bill was approved by Congress and sent to the President. *See supra* at 10-11. Congress's rejection of this proposal, which would have achieved by legislation the result the government seeks now by judicial decree, does not reveal what Congress intended in HETA in 1991 or in the DCIA in 1996. It does, however, underscore the wisdom of making Congress speak clearly when it wishes to take the unusual step of requiring one of its current enactments to abrogate, restrict, or otherwise affect future legislation. That is so because we now know that when Congress *was* presented with legislation that would have clearly subjected Mr. Lockhart's social security benefits to offset regardless of the age of his student loan debt, it ultimately rejected that legislation.

B. The Text and History of the DCIA Require Reversal.

Special features of the 1996 DCIA further support Mr. Lockhart's position. The very law that provided the government's authority to reach social security benefits – the

DCIA – contains its own provision regarding *when* the government is empowered to use a particular method of debt collection – offset – to collect a debt, and it prohibits collection by offset of claims that have been outstanding for more than 10 years.

Two aspects of the DCIA in 1996, in particular, strongly suggest that when Congress extended offset authority to social security benefits, while retaining the 10-year bar on offset authorization, it did so with the understanding that the 10-year bar applied to *all* social security offsets, regardless of the origin of the debt. *First*, when Congress enacted the DCIA as an amendment to the Debt Collection Act, it did more than simply authorize offset of social security benefits. Rather, as explained above (at 5-7), it carefully reviewed and overhauled the Debt Collection Act. The DCIA sought to streamline debt collection efforts within and among various federal agencies, require the agencies promptly to report delinquent debt to the Treasury Department for collection, and establish due process protections for alleged debtors so that they could verify and, if necessary, challenge proposed offsets. Pub L. No 104-134, § 31001(b), 110 Stat. 1321-358 – 1321-359 (setting forth DCIA's purposes); *see generally id.* 110 Stat. 1321-358 – 321-365. In the section of the DCIA immediately prior to the section expressly authorizing offset of social security benefits, Pub L. No. 104-134, § 31001(d)(2)(D), 110 Stat. 1321-359 – 1321-360 (codified at 31 U.S.C. § 3716(c)(3)(A)(i)), Congress explicitly recodified the 10-year bar provision and moved it from subsection (c) to subsection (e) of section 3716 of Title 31. *See* Pub L. No. 104-134, § 31001(d)(2)(C), 110 Stat. 1321-359.

As part of this recodification, Congress specifically reviewed what was then 31 U.S.C. § 3716(c) (and is now, as modified, 31 U.S.C. § 3716(e)). Subsection (c) was, prior to the DCIA's enactment in 1996, the concluding subsection of

section 3716. As explained above, it addressed the instances in which the offset authority of section 3716 "does not apply." *See* Pub. L. 97-452, § 1(16)(A), 96 Stat. 2472 (1983). Subsection (c)(1) prohibited offset for claims "outstanding for more than ten years." Subsection (c)(2) prohibited offset "when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved." As explained above, the DCIA retained the 10-year prohibition on offsets without any wording change. *See* 31 U.S.C. § 3716(e)(1). Congress did, however, alter subsection (c)(2) by eliminating the prohibition on administrative offset in situations where another statute provides for administrative offset of the claim or type of claim. *See* Pub. L. No. 104-134, § 31001(d)(2)(B), 110 Stat. 1321-359 (1996) (codified at 31 U.S.C. § 3716(e)(2)); *see supra* note 2. Thus, in 1996, Congress did more than comprehensively review and amend the Debt Collection Act. And it did more than center its attention on social security offsets. It also specifically focused on the very subsection at issue in this case – changing one part of it, *and retaining, without change, the 10-year bar on offset authority.*

For all of these reasons, it is sensible to conclude that Congress intended to apply the 10-year bar for *all* social security offsets. Put otherwise, under these circumstances, it is highly improbable that Congress intended that HETA, enacted five years earlier, should spring forward and capture offsets of social security benefits. Given Congress's express retention of the 10-year bar, Congress had to do something more if it wanted HETA to take precedence, and if it wanted to eliminate any time bar on social security offsets to recover student loan debt, the DCIA was the time and place to do it.

Second, the government's position ignores an important canon of statutory construction that "the provisions introduced

by [an] amendatory act should be read together with the provisions of the original section that were … left unchanged, in the amendatory act, as if they had been originally enacted as one section." 1A *Sutherland Statutory Construction* § 22.34 (6th ed. 2002); *accord United States v. La Franca*, 282 U.S. 568, 576 (1931); *Blair v. City of Chicago*, 201 U.S. 400, 475 (1906) (citing cases and treatise); *Natural Resources Defense Council, Inc. v. EPA*, 656 F.2d 768, 781 (D.C. Cir. 1981). The 1996 legislation authorizing social security offsets must, therefore, be interpreted to mean just what it says – as including all of the provisions of the Debt Collection Act into which it was inserted. The DCIA, therefore, authorized social security offset only as qualified by the requirement, now codified at 31 U.S.C. § 3716(e)(1), that it does not apply "to a claim … that has been outstanding for more than 10 years."

For all of these reasons, the government lacks the authority to offset Mr. Lockhart's social security benefits to collect his student loan debts that have been outstanding for more than 10 years.

CONCLUSION

The decision of the Ninth Circuit should be reversed and the case remanded with instructions that petitioner's social security benefits may not be offset to collect student loan debt that has been outstanding for more than 10 years.

Respectfully submitted,

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